



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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607 Fourteenth Street, NW
Washington, DC 20005

SEP 27 2010

RE: MUR 6263
The Committee to Re-Elect Artur Davis to
Congress and Byron Perkins, in his
official capacity as treasurer

Dear Mr. Svoboda and Mr. Wilson:

On March 23, 2010, the Federal Election Commission notified your clients, The Committee to Re-Elect Artur Davis to Congress and Byron Perkins, in his official capacity as treasurer, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). On September 21, 2010, the Commission found, on the basis of the information in the complaint, and information provided by your clients, there is no reason to believe the Committee to Re-Elect Artur Davis and Byron Perkins, in his official capacity as treasurer, violated 2 U.S.C. § 439a. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Delbert K. Rigsby, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Susan L. Lebeaux
Acting Deputy Associate General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: The Committee to Re-Elect Artur Davis to Congress and Byron Perkins, in his official capacity as treasurer **MUR: 6263**

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by Rev. Frederick J. Zylman, III. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges illegal expenditures and misuse of campaign funds by The Committee to Re-Elect Artur Davis to Congress and Byron Perkins, in his official capacity as treasurer, ("Committee") directly for the benefit of Artur Davis 2010, Davis's campaign for Alabama governor, and Katie Baker, Finance Director of Artur Davis 2010. Specifically, the complaint alleges that the Committee violated the personal use prohibition of the Federal Election Campaign Act of 1971, as amended ("the Act"), set forth at 2 U.S.C. §439a(a)(5) because the Committee allegedly violated Alabama law in connection with the donations. Essentially, the complainant alleges the Committee violated Alabama law by (1) failing to timely file the principal campaign committee form in January 2009 upon spending more than \$25,000 on the state campaign; (2) making expenditures from the federal campaign account to pay state campaign expenditures, such as polling, office rent, travel and payroll before June 1, 2009; (3) using the federal campaign account to raise money for the benefit of the state campaign during the period when Alabama candidates would have been prohibited from fundraising; and (4) failing to report the federal campaign expenditures on behalf of the state campaign on the state campaign's annual report for 2009. The Committee responds that (1) Artur Davis did not

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become a candidate for Governor until April 17, 2009; (2) the allegation that it violated state law is similar to the allegation in MUR 5826 (Mark Green for Congress) in which the Commission determined that a violation of state law does not create a violation of 2 U.S.C. § 439a(a)(5); and (3) the complaint does not allege any violation of any other statute or regulation over which the Commission has jurisdiction. Therefore, the Committee states, the Commission should find no reason to believe that the Committee violated the Act and dismiss this matter.

As discussed more fully below, there is no reason to believe the Committee violated 2 U.S.C. § 439a(a)(5) under either complainant's or the Committee's view of the facts. If the complainant's claim that Davis became a "candidate" under Alabama law in January 2009 is true, the polling and other expenditures by Davis's federal committee for the benefit of his gubernatorial campaign were permissible pursuant to 2 U.S.C. § 439a(a)(5). If the Committee's claim that Davis did not become a state candidate until April 17, 2009 is true, the use of the funds was for a lawful purpose not prohibited by 2 U.S.C. § 439a(b), and therefore permissible pursuant to 2 U.S.C. § 439a(a)(6). Accordingly, there is no reason to believe that The Committee to Re-Elect Artur Davis to Congress and Byron Perkins, in his official capacity as treasurer, violated 2 U.S.C. § 439a, and the Commission voted to close the file.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

According to the complaint, the Committee first violated Alabama law, and thus violated 2 U.S.C. § 439a(a)(5), by making expenditures of \$72,000 for Davis's gubernatorial campaign before June 1, 2009, the date that Alabama law permitted

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expenditures by state campaigns for Governor. The complaint alleges that the Committee spent funds on a poll for Davis's gubernatorial campaign in January 2009, as evidenced both by a \$27,000 expenditure to Anzalone/Liszt Research disclosed in the Committee's April 2009 Quarterly Report, and by a January 2009 press release on Davis's gubernatorial campaign website discussing the results of this poll without indicating the poll concerned any issues related to a congressional campaign. The complaint also alleges that the Committee spent funds on Davis's gubernatorial campaign for other expenses before June 1, 2009, such as office rent, travel expenses, and salary payments, and it cites to an attached news article reporting that the Committee was transferring an employee to the state campaign.

Complainant alleges the state committee also violated Alabama law by filing a required campaign committee form late. The complaint alleges that, under Alabama law, Davis's gubernatorial campaign should have filed a principal campaign committee form in January 2009, when Davis's federal committee spent more than \$25,000 for the benefits of Davis's state campaign. Davis's gubernatorial committee did not file this form until April 17, 2009.

Additionally, the complaint alleges that the Committee misused federal campaign funds because it failed to refund contributions made after February 6, 2009, the date that Congressman Davis announced his candidacy for Governor, as requested by the Reports Analysis Division ("RAD") in its May 19, 2009, Request for Additional Information ("RAI") to the Committee. Even though the Committee responded to RAD that Congressman Davis became a candidate for Governor on April 17, 2009, the date he filed his principal campaign committee with the Alabama Secretary of State, the complaint

alleges that the Committee misled the Commission in stating that all financial activity before April 17, 2009, was for the benefit of his federal campaign. The complaint also points out that the Committee never responded to RAD's Disavowal Notice in October 2009 directing that Artur Davis file a Statement of Candidacy or disavow that he was a candidate for Congress.

In support of the claims that the Committee violated 2 U.S.C. § 439(a)(5), the complaint attached newspaper articles about the Alabama gubernatorial campaign. One article reported that Davis's federal committee had been paying the state campaign's administrative costs and quoted a Davis spokesperson as stating that this practice was temporary until the state campaign account was opened. *See Mary Orndorff, Davis Campaign Gets \$1.1 Million Jump; Congressional Race Money Will aid State bid in 2010*, Birmingham News, April 17, 2009. This article also reported that the spokesperson stated that "the campaign's legal counsel provided an opinion that the arrangement follows state and federal campaign law because the state campaign staff are technically still working under the committee to re-elect Davis to Congress in 2010." *Id.*

In response, the Committee primarily addresses the allegation that the Committee violated 2 U.S.C. § 439a(a)(5), which permits donations from federal candidates or officeholders to state and local candidates "subject to the provisions of State law." The response states that the Commission has interpreted the quoted language as meaning that a violation of section 439a(a)(5) is not predicated on a violation of state law, citing MUR 5826 (Mark Green for Congress) (Commission found no reason to believe Respondents violated section 439a(a)(5) where Green's federal committee transferred funds to Green's state gubernatorial committee, even if the transfer violated state law).

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Thus, the Committee requests that the Commission dismiss this matter. The Committee also states that the complaint only alleges state law violations in connection with 2 U.S.C. § 439a(a)(5), and does not allege violation of any other statute or regulation over which the Commission has jurisdiction. Finally, the Committee states that the complaint presents no facts to support the allegation of untimely fundraising or refunds or other misuses of federal campaign funds. The response does not specifically address the issue of the Committee's spending for the gubernatorial campaign out of federal campaign funds before Davis officially filed for the gubernatorial election.

B. Legal Analysis

Contributions accepted by a candidate may be used for various purposes without violating the Act's "personal use" prohibitions. Section 439(a) of the Act lists five specifically permissible non-campaign uses of such funds, and it also generally permits the use of such funds for any other lawful purpose, unless prohibited by 2 U.S.C. § 439a(b). 2 U.S.C. § 439a(a)(1) through (6); see also 11 C.F.R. § 113.2. One of five specifically-permitted uses is set forth in section 439a(a)(5), which permits contributions accepted by a federal candidate and any other donation received by an individual as support for activities of the individual as a holder of federal office to be used for donations to state and local candidates "subject to the provisions of State law." Section 439a(b)(1) prohibits the conversion of campaign funds to personal use, and 2 U.S.C. § 439a(b)(2) lists a number of uses that would constitute personal use. This list does not include making donations to state campaigns or uses that violate state law.

Complainant's allegation that the Committee violated 2 U.S.C. § 439a(a)(5) is based on claims that the Committee's expenditures violated Alabama law, but this

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allegation lacks merit. The Commission determined in MUR 5826 (Mark Green for Congress) that section 439a(a)(5)'s reference to the "provisions of State law" merely affirms the states' authority to regulate the financing of their own elections. See Factual and Legal Analysis in MUR 5826. In that matter, complainant alleged that Representative Mark Green donated from his federal committee to his gubernatorial committee in violation of Wisconsin law, and hence violated 2 U.S.C. § 439a(a)(5). The Commission, found, however, that this provision, unlike Section 439a(b), is (1) permissive and not prohibitive; (2) is consistent with the previous guidance in advisory opinions that the "subject to the provisions of State law" language merely advises a transferor that state law is not preempted by federal-to-state transfers; and (3) recognizes that a state is in a better position than the Commission to interpret its own laws. *Id.* Therefore, the Commission found no reason to believe there was a violation of the Act because, "a violation of state law does not create a violation of Section 439(a)(a)(5)." *Id.* at 3.

Similarly, there is no reason to believe that respondents' alleged violation of Alabama law results in a section 439a(a)(5) violation, even under complainant's view of the facts. The complainant alleges that Davis became a "candidate" under Alabama law as early as January 2009 when the Committee paid \$27,000 for a poll allegedly in connection with Davis's state campaign several months before the state committee filed its campaign committee form. Even if that is the case, according to the reasoning in MUR 5826, the Committee's in-kind donations to Davis's non-federal campaign efforts were permissible pursuant to 2 U.S.C. § 439a(a)(5).

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The Committee's view of the facts is that Artur Davis became a state candidate on April 17, 2009. Although Artur Davis reportedly announced on February 6, 2009, that he would run for Governor, records at the Alabama Secretary of State's Office confirm that Davis filed the form for his principal campaign committee for Governor on April 17, 2009. The Committee also reported that, as of April 17, 2009, it was no longer accepting contributions for the congressional campaign.¹ The Committee's response does not deny the complaint's allegations that it used its campaign funds on polling, office rent, payroll, and other expenses for Davis's gubernatorial campaign before Davis filed as a state candidate on April 17, 2009, and established a state campaign committee.²

If the Committee's assertion that Davis did not become a state "candidate" until April 17, 2009 is true, then 2 U.S.C. § 439a(a)(5), which covers only donations to "State candidates," does not apply to the Committee's pre-April 17, 2009, spending. Even so, that spending appears permissible pursuant to 2 U.S.C. § 439a(a)(6), which permits campaign funds to be used "for any other lawful purpose unless prohibited by" 2 U.S.C. § 439a(b).

As mentioned above, section 439a(b)(2) states that a contribution accepted by a candidate or any other donation received by an individual as support for activities of the individual as a holder of Federal office shall "be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or

¹ The Committee issued a press release on April 16, 2009, stating that it stopped accepting in-state campaign contributions after February 6, 2009, but was continuing to raise limited national funds to pay campaign personnel and overhead costs, and that any funds received after February 6, 2009, would not be transferred to the gubernatorial account in June 2009.

² On June 1, 2009, Davis's federal committee donated \$1 million to his gubernatorial committee, a permissible use under 2 U.S.C. § 439a(a)(5) since he had become a state candidate. See MUR 5826 (Mark Green for Congress).

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expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office." The provision cites specific examples of such conversion of contributions or donations: home mortgage payments; rent or utility payments; a clothing purchase; a non campaign-related automobile expense; a country club membership; a vacation or other non campaign-related trip; a household food item; a tuition payment; admission to a sporting event, concert, theater, or other form of entertainment not associated with an election campaign; and health club or recreation facility dues or fees. *See also* 11 C.F.R. § 113.1(g)(1)(i)(A) through (J) for these and other examples. This list is not exhaustive, and the Commission determines on a "case-by-case basis," whether "other uses of funds in a campaign account fulfill a commitment, obligation or expense that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 C.F.R. §113.1(g)(1)(ii). This regulation provides specific examples of such other impermissible uses, which do not include in-kind donations from a federal candidate's or office holder's campaign account to his or her campaign for state office before becoming a state "candidate." 11 C.F.R. § 113.1(g)(1)(ii). In applying the case-by-case approach, the Commission "reaffirms its long-standing opinion that candidates have wide discretion over the use of campaign funds." *See* Explanation and Justification, Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7867 (February 9, 1995).

In Advisory Opinion 2007-29 (Jesse Jackson, Jr. for Congress), the Commission used the case-by-case approach in analyzing whether it was permissible for the Jackson Committee to donate funds to the campaign of Congressman Jackson's wife, Sandi

Jackson, to be the Seventh Ward representative on the Cook County Democratic Party Committee, a political party office that was not covered by 2 U.S.C. § 439a(a)(5). In advising that the Jackson Committee could donate the funds to Jackson's wife's campaign pursuant to section 439a(a)(6) and 11 C.F.R. § 113.2(e), the Commission noted that the use of the funds was analogous to transfers to political party committees and donations to state and local candidates, which are permitted by 2 U.S.C. §§ 439a(a)(4) and (5). In applying the case-by-case approach to the personal-use test, the Commission reaffirmed its position that candidates have wide discretion over the use of campaign funds. AO 2007-29 at 3.

Likewise, in this matter, even assuming Davis did not become a state "candidate" until April 17, 2009, the Committee's use of funds before that date for his gubernatorial campaign was analogous to donations to a state candidate, which are permitted by 2 U.S.C. § 439a(a)(5). Supporting Davis's exploratory efforts before becoming a candidate is a lawful purpose not specifically prohibited, and the Commission recognizes candidates have wide discretion over the use of campaign funds. Thus, as in AO 2007-29, the Committee's use of the funds should be considered permissible under 2 U.S.C. § 439a(a)(6).³ The Commission expresses no position concerning whether the Committee's activities were permissible under Alabama law or when Davis became a "candidate" under Alabama law.

³ The complaint did not allege any reporting violations. On the disclosure reports, the purposes of the expenses included "polling report invoice," "reimbursement campaign travel expenses," "office space - rent and parking," and "payroll," which appear to be adequate descriptions and may have covered mixed federal/state disbursements. The Committee's reporting of these expenses appears to comply with the reporting requirements at 2 U.S.C. § 434(b)(4) and with 11 C.F.R. § 104.3(b)(4)(A), which sets forth examples of adequate descriptions of the purpose of disbursements.

Based on the above, there is no reason to believe that The Committee to Re-Elect Artur Davis to Congress and Byron Perkins, in his official capacity as treasurer, violated 2 U.S.C. § 439a, and the Commission closes the file.⁴

⁴ With regard to RAD's RFAI, the Committee stated it had no obligation to refund contributions received after February 6, 2010 because Davis did not become a gubernatorial candidate until April 17, 2009. The Committee's disclosure reports do not reflect receipt of any federal contributions after April 15, 2009. With respect to RAD's October 2009 Disavowal Notice to the Committee, it appears that the Committee never filed a Statement of Candidacy, nor disavowed that Davis was a federal candidate. However, the Committee's earlier response to RAD that Davis became a state candidate on April 17, 2009, coupled with the fact that it stopped accepting contributions after April 15, 2009, appear sufficient to inform the public that Davis was not a candidate for federal office after April 17, 2009.

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